

of identification is not conclusive proof that the person was not there. You have to consider all the other evidence which may exist to connect the person. So if what the accused has told you is consistent with his innocence or even raises doubt in your minds about his connection with the robbery and the killing then you must acquit him."

There is nothing in that part of the learned trial judge's summing-up to support the argument that he told the jury that the appellant's alibi required corroboration or that there was any burden on the appellant to show that his story was true.

There were numerous other grounds as set out in the rather lengthy petition of appeal. In our judgment there was nothing in them to warrant a detailed examination of them.

The last ground we had to deal with was that the learned trial judge failed to direct the jury adequately or at all as to the possibility of returning a verdict of culpable homicide not amounting to murder, even though this possibility was not raised by the defence. For this counsel for the appellant relied on the Singapore case of *Chung Kum Moey v. Public Prosecutor*.⁽⁴⁾ In our judgment the facts in that case were quite different from the facts in the present case. In that case the shots were fired in order to frighten the deceased into handing over his keys and to prevent him from reaching the telephone and the trial judge had formed the view that the accused's intention was only to shoot the deceased in the forearm. In the present case a shot was fired in the back of the deceased in order to make him loosen his grip of one of the robbers so that all three of them could make a clean getaway. It was clear from all the evidence in the case that the robber who was held by the deceased had been unable to get himself released. The other two were obviously not going to leave him behind to be used as a witness against them. Their intention, therefore, was obviously to shoot to kill.

All the indications were that it was the appellant who fired the fatal shot. In his statement to the magistrate the appellant had said that he ran to the office and put the money into the paper bag. There was evidence that the shot which killed the watchman was the second shot which rang out when the robber coming out of the cashiers' cage and carrying a bulging sack and a pistol went to the aid of the robber who was still being held by the watchman and hit the watchman from behind. Although no one identified the appellant as the robber who hit the watchman from the back, he was the only one carrying the bulging sack. In all likelihood therefore he was the robber who fired the shot just before the watchman fell. The first shot which rang out when the watchman was holding the robber in the foyer went off when the gun was being held pointed upward in the air. The wound which killed the watchman was from the back going through the abdomen and the intestines. Another reason for surmising that it was the accused's gun shot which killed the watchman was that a new pair of shoes was found near the watchman and the accused led the police to a spot where the box belonging to the shoes was hidden.

In our judgment the failure to direct the jury on the need to consider the lesser verdict of culpable

homicide not amounting to murder was not such a misdirection as would lead to a miscarriage of justice. In the present case we think the probabilities were very strong that even if the jury had been directed on the need to consider the lesser verdict they would in view of the evidence at the trial inevitably have reached the same conclusion. For this reason we were satisfied that this was a case in which the proviso to section 60(1) of the Courts of Judicature Act, 1964 should be applied and we did so.

For the reasons we have stated we dismissed the appeal.

Appeal dismissed.

Solicitors: *Kumar, Chan & Chia.*

ROYAL INSURANCE GROUP v. DAVID

[F.C. (Gill Ag. L.P., Ali Ag. C.J., Wan Suleiman F.J.)
October 3, 1975]

[Ipoh — Federal Court Civil Appeal No. 51 of 1975]

Contract — Del credere agency — Liability in respect of insurance premiums — Civil Law Act, 1956, s. 5(1).

Insurance — Agent — Liability in respect of insurance premiums.

The appellant company had claimed the sum of \$1,981.72 being the amount of premia due in respect of policies issued by the appellants through the respondent as their *del credere* agent. Judgment was given for the appellants in the Sessions Court at Ipoh but on appeal to the High Court, the learned trial judge allowed the appeal and dismissed the claim. The appellant appealed to the Federal Court.

Held, allowing the appeal: as the respondent was a *del credere* agent he was liable irrespective of whether or not he had collected the premia from the persons to whom the policies were issued through his agent. There was no dispute in this case as to the quantum of premia claimed from the respondent and the amount claimed was therefore an ascertained sum.

Cases referred to:-

- (1) *J.M. Wotherspoon & Co. Ltd. v. Henry Agency House* [1962] M.L.J. 86.
- (2) *Thomas Gabriel & Sons v. Churchill & Sim* [1914] 3 K.B. 1272, 1279.
- (3) *Rusholme & Bolton & Roberts Hadfield Ltd. v. S.G. Read & Co. (London) Ltd.* [1955] 1 W.L.R. 146, 151.
- (4) *International Railway Co. v. Niagara Parks Commission* [1941] A.C. 328.
- (5) *Morris v. Cleasby* 105 E.R. 943, 947.
- (6) *Nind v. Marshall* 129 E.R. 746, 749.
- (7) *Bankers and Traders Insurance Co. Ltd. v. Allied Insurance Services* [1969] 1 M.L.J. 81.

FEDERAL COURT.

V. T. Nathan for the appellants.

L. H. Singh for the respondent.

Gill Ag. L.P. (delivering the judgment of the Court): This was an appeal against the decision of Hashim Yeop A. Sani J. allowing the respondent's appeal from a judgment against him as defendant in an action in the Sessions Court at Ipoh in which the appellant insurance company as plaintiffs made a claim for a sum of \$1,981.72 being the amount of premia due in respect of policies issued by the plaintiffs through the defendant as their agent. We allowed the appeal and now state our reasons.

The facts of the case were as follows. The plaintiffs appointed the defendant as their agent in April or May 1968. They confirmed his agency commission by their letter to him dated August 22, 1969 (P1). The terms of the agency, as stated in their further letter of October 5, 1970 (P2) and confirmed by the defendant, were as follows:—

"This appointment is on the understanding that you are a *"del credere"* agent of the Company and are responsible for payment to us of all premia in respect of policies issued through your agency irrespective of whether or not the said premia have actually been collected by you. A statement will be submitted monthly and we require settlement within 30 days from time of receipt."

In accordance with the terms of the agency, the plaintiffs sent to the defendant his monthly statement of accounts until June 16, 1971 when his agency was terminated. The amount then due from him to the plaintiffs was alleged to be \$2,558.58. The claim in the action was for that amount but it was subsequently amended to \$1,981.72.

In his statement of defence the defendant averred that the plaintiffs' resident representative in Perak had renewed policies without instructions and had debited the amount of premium in each case in his account, and that the plaintiffs had failed or neglected to credit his account with the amounts due to him by way of commission. He further averred that deducting from the plaintiffs' claim of \$2,558.58 the sum of \$1,532.42 as the premia on the policies renewed without instructions and the sum of \$922.93 as commission due to him on previous policies and not credited to his account by the plaintiffs, the amount due from him was only \$103.23. However, he produced no evidence at the trial of the action in support of his plea that the only amount due from him was \$103.23.

The plaintiffs tendered in evidence their despatch book showing the monthly statement of accounts sent to the defendant by their Ipoh office. They also produced a file of all policies and renewals issued through the defendant's agency. All this evidence was never challenged by the defendant. Indeed, by his letter dated September 16, 1970 (P14) the defendant had confirmed that the balance of \$1,809.76 standing to the debit of his account in the company's books as on June 30, 1970 was correct, although he added that his account had been wrongly debited with a sum of \$304.50. Again by his letter dated May 4, 1971 (P18) the defendant promised to collect and forward the balance by the end of the month.

As regards the sum of \$304.50 which was the only amount disputed by the defendant, evidence on behalf of the plaintiffs was that it was in respect of the renewal by the defendant of his own motor car policy which was first issued to him through their former agent named Jefrell. The defendant gave evidence to say that he had settled the amount claimed from him with Jefrell. However, on the evidence before him the learned trial president found as a fact that the defendant had not settled this amount with the former agent and that it was open to the plaintiffs to claim the money from the defendant either as their agent or the insured.

A The only other issue to be decided by the learned trial president was in relation to the terms of the agency. In paragraph 3 of his statement of defence the defendant said that it was not and never was a term of the agency that he was liable to pay to the plaintiffs all premia due on policies issued through his agency whether or not the premia had been collected. In his evidence in court he said that he did not understand the meaning of *"del credere"* when he signed the agreement, and that a week later when a lawyer explained to him what it meant he telephoned the plaintiffs' representatives in Ipoh who promised to settle the matter with the head office but did nothing. The truth of course is that he took no steps to terminate the agreement or have it rectified.

C The findings which the learned president made as regards this issue were stated in his judgment as follows:—

"A person is deemed to know what he signs to and if he says he does not understand or had been forced or threatened to do so, he has to prove it. In this case I find that the defendant is an intelligent man and speaks and understands English well.

D *'Del credere'* is no doubt a term of art but bearing in mind that he is a business man and agent to other insurance companies he should be familiar with it. Even if he did not, his subsequent conduct seems to show after he found out what it meant he agreed to it. He continued to be an agent and earned the increased commission."

E In the result the learned president gave judgment in favour of the plaintiffs in the sum of \$1,981.72, together with interest thereon at 6% per annum from the date of action to the date of judgment.

F On appeal, the learned judge agreed with the learned president's findings of fact, but he thought that the problem did not end there. In his opinion, for the plaintiffs to succeed they had to base their claim either on the *del credere* agency or on contract. In this connection he pointed out that as our Contracts Act 1950 is silent on the subject of *del credere* agency, the law applicable in England is applicable here by virtue of section 5(1) of the Civil Law Act 1956 as decided by Suffian J. (as he then was) in *J.M. Wotherpoon & Co. Ltd. v. Henry Agency House*.⁽¹⁾ He then stated the legal position of a *del credere* agent under the English law as follows.

H A *del credere* agent is a mercantile agent who, in consideration of extra remuneration, called a *del credere* commission, guarantees to his principal that third persons with whom he enters into contract on behalf of the principal shall duly pay any sums becoming due under those contracts. In *Thomas Gabriel & Sons v. Churchill & Sim*,⁽²⁾ Buckley L.J. said:—

I "The liability of the *del credere* agent is a contingent pecuniary liability, not a liability to perform the contract; it is a pecuniary liability to make good in an event the default of the buyer in respect of a pecuniary liability. It does not extend to other obligations of the contract. It does not expose the *del credere* agent to an action to ascertain the sum due. It is limited to a contingent pecuniary liability in respect of a sum which, as between the seller and the buyer, is an ascertained sum."

In *Rusholme & Bolton & Roberts Hadfield Ltd. v. S.G. Read & Co. (London) Ltd.*⁽³⁾ Pearce J. said this: "If the defendants' liability were similar to that of a *del credere* agent, they would not be liable until the plaintiffs

had sued the Australian company and quantified their damages in such litigation...."

In the light of the above authorities the learned judge observed that a *del credere* agent is only liable in respect of an ascertained sum or sums certain due as a debt from the buyer to the seller; he is not the person with whom the seller is entitled to litigate disputes arising out of the contract and ascertain what is due on it.

The conclusions at which the learned judge arrived were stated in his judgment as follows:

"There is no evidence in the instant case that the defendant was other than an agent of the plaintiffs. Whatever may be the terms purporting to be included in the letter (Exhibit P2) signed by the defendant the fact remains that the plaintiffs themselves have referred in that letter to the defendant as their *del credere* agent. In my view the plaintiffs should not now be allowed to depart from what they themselves throughout held the defendant to be, i.e. their *del credere* agent. Under the circumstances the plaintiffs should be bound by the accepted meaning of *del credere* agency. A *del credere* agent or an agent acting under a *del credere* commission is an agent for the sale of goods who, in consideration of a higher reward than is usually given, guarantees the due payment of the price of all goods sold by him, that is to say, engages to pay the price himself if the purchaser does not."

He therefore held that as there was no evidence in the instant case that the plaintiffs had sought to recover the premia from the persons to whom the policies were sold by the defendant as agent of the plaintiffs, they were not entitled to recover them from the defendant.

With respect, it seemed clear from the authorities that the obligation on the principal to sue the debtor first arises only where the amount claimed from the *del credere* agent is not an ascertained sum. In the present case, apart from the sum of \$304.50 which the defendant claimed had been wrongly debited to him but was found by the learned president to have been rightly claimed from him, there was no dispute whatsoever as to the quantum of premia claimed from the defendant.

The learned judge took the view that the credibility of the figures in those accounts would seem to be uncertain because of the letter (D8) dated May 17, 1971 which was allegedly written by the Guru Besar, Sekolah Menengah, Malim Nawar to the plaintiffs, with a copy to the defendant, to ask why renewed policies were sent to him when he had made no order to have them renewed and why debit notes were sent to him when he had never renewed any policy with their company. But the two witnesses for the plaintiffs gave evidence to say that they had never seen D8. Moreover, the writer of the letter who was present in court and was identified as one Mr. Lee Peng Han was not called by the defendant to give evidence. In the circumstances, the letter could not be said to be properly in evidence and should have been disregarded by the learned judge. Indeed, by reason of the fact that Mr. Lee was not called to give evidence the learned judge should have drawn an adverse inference against the defendant under section 114(g) of the Evidence Act 1950.

The learned judge also doubted the credibility of the figures in the accounts because the plaintiffs had amended their claim from \$2,558.58 to \$1,981.32. But the claim was amended because certain premia

A had been received subsequent to the filing of the action. This was stated by counsel for the plaintiffs when he made a formal application for leave to amend at the commencement of the trial. Counsel for the defendant raised no objection to the proposed amendment, whereupon the learned president allowed the amendment.

B It seemed clear to us that there was no evidence of any dispute as to the quantum of premia due from any of the persons to whom the plaintiffs issued policies of insurance through the agency of the defendant. There was therefore no obligation on the part of the plaintiffs to litigate with the policy holders before making their claim against the defendant. The sums due were quantified and set out in the statements of account which were produced in court together with every policy issued through the defendant's agency. The amount claimed from the defendant was long overdue in view of the credit facility provided by the plaintiffs to the defendant. The only reason advanced by the defendant for the delay in payment was that he was unable to collect from his clients. In the circumstances, we were of the opinion that the defendant was liable even on the basis of the *del credere* agency.

Assuming that we were wrong in forming that opinion, a *del credere* agent may assume a greater liability than that implied by law. As stated by the Privy Council in *International Railway Co. v. Niagara Parks Commission*,⁽⁴⁾ there is nothing to prevent an agent from entering into a contract on the basis that he is himself liable to perform it as well as the principal. In *Rusholme's case* it was held that the fact that a person is agent and is known to be so does not of itself prevent his incurring personal liability. In *Morris v. Cleasby*⁽⁵⁾ Ellenborough C.J. lent support to the view that a *del credere* agent may take on a larger liability when he said:

"The principal must always be debtor, and that, whether he is known in the first instance or not, except where the broker has by the form of the instrument made himself so liable."

G In dealing with the plaintiffs' claim on the basis that it was founded in contract, the learned judge held that they were not entitled to recover because the agreement sued on was void under section 16 of the Contracts Act 1950 for want of consideration, there being no evidence to satisfy all the requirements of paragraph (b) of that section for, although there seemed to be an agreement to compensate "wholly", there was no evidence that the plaintiffs had done something voluntarily for the promisor.

H With respect, we found ourselves unable to agree with the learned judge that the agreement was void for want of consideration. The learned trial president found as a fact that the defendant received a higher rate of commission as from the date of P1. His lordship agreed with that finding and held that there was a *del credere* agency as from the date of P1. In the circumstances there was no cause for invoking section 26 of the Contracts Act 1950. In any event section 138 of the Act provides that no consideration is necessary to create an agency.

It was on a contract of agency that the plaintiffs had brought their action. That contract was indivisible and incapable of partial performance. As stated by Richardson J. in *Nind v. Marshall*,⁽⁶⁾ the only safe rule to be followed in the construction of a deed is the intention of the parties to be collected from a due consideration of the whole instrument. In our judgment, there was no ambiguity in the contract of agency taken as a whole. The defendant was therefore liable irrespective of whether or not he had collected the premia from the persons to whom the policies were issued through his agency. If any authority is required for that proposition it is to be found in *Bankers and Traders Insurance Co. Ltd. v. Allied Insurance Services*.⁽⁷⁾

For the reasons we have stated we allowed the appeal, thus restoring the judgment of the learned president.

Appeal allowed.

Solicitors: *Shearn, Delamore & Co.; L. H. Singh & Co.*

**RE KONG THAI SAWMILL (MIRI) SDN. BHD.;
LING BENG SUNG v. KONG THAI SAWMILL
(MIRI) SDN. BHD. & ORS. (NO. 2)**

[F.C. (Lee Hun Hoe C.J. (Borneo)) October 13, 1975]
[Kuching — Federal Court Civil Appeal No. 101 of 1974]

Practice and Procedure — Appeal — Appeal to Yang Dipertuan Agung — Application for stay of execution.

In this case the first respondent applied for leave to appeal to the Yang Dipertuan Agung and for stay of execution.

Held: as no special circumstances were shown to support the application for stay of execution in this case the application for stay must be refused.

Cases referred to:-

- (1) *Re Chi Liung & Son Ltd.; Tong Chong Fah v. Tong Lee Hwa & Ors.* [1968] 1 M.L.J. 97.
- (2) *Griffiths v. Benn* 27 T.L.R. 350.
- (3) *Atkins v. Great Western Railway Company* 11 T.L.R. 400.
- (4) *Smith, Hogg & Co. Ltd. v. The Black Sea & Baltic General Insurance Co. Ltd.* 162 L.T. 11.
- (5) *Wilson v. Church (No. 2)* (1879) 12 Ch. D. 454.
- (6) *Metropolitan Real and General Property Trust Ltd. v. Slaters and Bodega Ltd.* [1941] 1 All E.R. 310.
- (7) *Monk v. Bartram* [1891] 1 Q.B. 346.

FEDERAL COURT.

Peter Mooney (Joseph Tang with him) for the appellant.

C. T. Wong for the respondent.

Lee Hun Hoe C.J. (Borneo): Leave to appeal against the decision of the Federal Court delivered on August 4, 1975, to the Yang Dipertuan Agung and stay of execution in respect of the first two orders were granted to second and third respondents soon after the delivery of judgment. The first respondent, the Kong Thai Sawmill (Miri) Sdn. Bhd. now applies for leave to appeal to the Yang Dipertuan Agung and for stay of execution in respect of three further orders. Leave to appeal has not been opposed.

Several grounds were put forward for stay of execution. It was said that the appointment of "watchdog director" was inconsistent with and in contravention of the Articles of Association of the company. The case of *Re Chi Liung & Son Ltd., Tong Chong Fah v. Tong Lee Hwa & Ors.*⁽¹⁾ was cited. There because of a pending probate action the court was prepared to maintain the *status quo* till the determination of that action. In the present case the situation is entirely different. Another ground was that two of the persons named as alternate "watchdog directors" were not parties to the action and that this would be unfair to the other shareholders. It was further said that the company was, therefore, unnecessarily burdened with pecuniary burden in the form of fees to directors.

The application for stay was strenuously opposed. It was submitted that apart from various reasons for the appointment of "watchdog directors" such appointment was not only in the interest of appellant but also other shareholders. It was further submitted that the Federal Court made the various orders after detailed argument on law and facts and that I should not disturb the orders. Whether the Federal Court is right or not is a matter for the Privy Council. There is an affidavit by appellant in reply to one by Datuk Ting Lik Hung, a director of the company.

In *Griffiths v. Benn*⁽²⁾ the Master of the Rolls indicated that:—

"...where, after a full hearing, a definite conclusion was arrived at by the Court of Appeal, it was not fair on a successful litigant to hamper him with any such undertaking and it would need most exceptional circumstances to induce this court to accede to such an application."

In *Atkins v. The Great Western Railway Company*⁽³⁾ where in support of an application for stay of execution pending appeal it was alleged that a great deal of prejudice had been imported into the case at the trial and that there were strong grounds for the appeal, the court held that the grounds were not sufficient to grant the application. The Master of the Rolls said that he would not undertake to say that the Court of Appeal would never listen to what happened at the trial in order to see whether they would grant a stay of execution. However, he observed that as a general rule, the only ground for such a stay was an affidavit showing that if the damages and costs were paid there was reasonable probability of getting them back even if the appeal succeeded. He would not say that the court would not interfere for some other reason, but that there were strong grounds for appeal was no reason for no one ought to appeal without strong grounds for doing so.

Again in *Smith, Hogg & Co. Ltd. v. The Black Sea & Baltic General Insurance Co. Ltd.*⁽⁴⁾ where in dismissing a motion for stay of execution of the order of the Court of Appeal for assessment of damages pending an appeal to the House of Lords, Scott L.J. said:—

"The Court of Appeal has had to consider this question some time ago and decided that the practice on appeals to the House of Lords was that stay of execution, pending such an appeal, would not be granted save under very exceptional circumstances, such as for instance, where execution would destroy the subject-matter of the action or deprive the appel-